leave to deliver interrogatories will be made before the close of the pleadings. This is clear from the following passage in *Atkins'* Court Forms 2nd Ed. Vol. 22 page 367.

"Although the court has jurisdiction to grant leave to interrogate at any stage of the proceedings, in practice leave will not be granted, unless there are exceptional circumstances, before the pleadings are closed and the issues to be tried are clearly defined. It has been said that interrogatories must relate to an issue between the parties, and since the issues are not generally clear until after defence, such a course would be very unusual and the burden on the applicant to persuade the court that leave should be given would be a heavy one. Indeed, interrogatories are not very often ordered (other than by consent) until after discovery has taken place."

The learned judge, through an oversight, referred to the above passage for the contrary view.

Counsel for the respondent conceded that he could not support the whole of the judge's judgment but he contended that some of the interrogatories could not be said to be relevant to the issues. We disagreed. He also contended that some of the interrogatories related to contents of documents, so that what was being asked was secondary evidence of documents. For this contention he relied on the authority of *Wolverhampton New Waterworks Company* v. *Hawksford*;[7] *Robinson & Others* v. *Budgett & Co.*;[8] *Sampson Morris, and Ann* v. *John Edwards*.[9] We agreed with this contention. And Counsel for the appellant agreed that interrogatory 3(e) should be struck out.

For the reasons we have stated we allowed the appeal with costs here and in the court below, setting aside the order appealed from and substituting in its place an order that the appellant do have leave to deliver the interrogatories with the exception of interrogatory 3(e), such interrogatories to be answered by the first defendant within 14 days from the date of service of the order.

Appeal allowed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Wong & Paramjothy.*

BALAN v. NATIONAL ELECTRICITY BOARD EMPLOYEES UNION

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) November 28, 1974]
[Kuala Lumpur — Federal Court Civil Appeal No. 65 of 1974]

Master and Servant — Contract of service — Implied term — Incapacity of servant from illness — Claim for salary.

In this case the appellant had been engaged by the respondent union as their executive secretary. While he was on medical leave he gave the respondent six months' notice of resignation. He remained on medical leave until the expiry of the notice and he then claimed salary for the period. Wan Suleiman J. held that the appellant was not entitled to his salary while he was on medical leave ([1974] 1 M.L.J. 217).

Held, allowing the appeal: as there was no term in the contract of employment that no salary was payable during incapacity, the appellant was entitled to his salary during the period of such incapacity.

Cases referred to:-

(1) *Reigate* v. *Union Manufacturing Company (Ramsbottom) Limited and Elton Cop Dyeing Company Ltd.* [1918] 1 K.B. 592, 605.

(2) *Orman* v. *Saville Sportswear Ltd.* [1960] 3 All E.R. 105, 111.

(3) *Appuhamy* v. *Dato' Ajit Singh* [1970] 1 M.L.J. 194.

FEDERAL COURT.

D. Puthucheary for the appellant.

F. Goonting for the respondents.

Gill C.J. (delivering the judgment of the Court): By an agreement dated 16th October 1968 the appellant was engaged by the respondent union as their Executive Secretary for 5 years from 1st December 1968 at a salary of $500 per month. On 25th September 1972, when he was on medical leave, he gave the respondents six months' notice of resignation in accordance with clause 14 of the agreement to commence from 1st October 1972. He remained on medical leave until the expiry of the notice, and then made a claim for his salary for the period of six months and one-third of the medical fees which he had incurred during that period.

On the respondents refusing to pay, the appellant brought an action in the Sessions Court at Kuala Lumpur for the recovery of $3,000 as salary and $46 as medical fees. The respondents' defence to the action was that the appellant had not turned up for work during the period of notice of resignation and that during that period in breach of his service agreement he had engaged himself in business other than that of the respondents' by commencing his own agency business under the name and style of "Syarikat Pioneer Commercial Agency."

On the evidence produced at the trial of the action, the learned Senior President of the Sessions Court found that despite the fact that the appellant had himself admitted to having assisted in a small way at the Syarikat Pioneer Commercial Agency, for which he was paid small sums which were more in the nature of gifts, such activities did not amount to a breach of the service agreement. He also found as a fact that the appellant was granted medical leave for the whole period by one Dr. Sundrum on account of his illness.

As regards the question whether the appellant was entitled to his salary during his absence from work on account of his illness, the learned President decided on considering the relevant authorities on the point that it was an implied term of the contract under which the appellant was employed that he was so entitled. In the result he gave judgment for the appellant as claimed.

The respondents appealed to the High Court. Wan Suleiman J. in dealing with the appeal agreed with the learned Senior President's finding that the appellant was ill during the relevant period so as to justify his being on medical leave, and that the appellant's activities in Syarikat Pioneer did not amount to a breach of the service agreement. But he disagreed with the learned President's finding that the appellant was entitled to his salary under an implied term of the contract. The view which his Lordship took

was that the earlier occasions, on which the appellant was paid his salary while on sick leave, clearly showed that payment of salary during lengthy periods of medical leave was conditional on the union's approval, as distinct from short term medical leave where the general secretary was the authority who could grant paid leave. He therefore allowed the respondents' appeal and set aside the learned Senior President's judgment.

From the decision of Wan Suleiman J. the appellant appealed to this court. In dealing with the appeal the main question which we had to decide was whether in all the circumstances of the case the appellant was entitled to his salary for the period of his notice of resignation during which he was undoubtedly absent from work on account of his illness.

It was common ground that the appellant's contract of service was silent on this point. In *Reigate* v. *Union Manufacturing Company (Ramsbottom), Limited and Elton Cop Dyeing Company Ltd.*[1] Scrutton L.J., in dealing with the implication of terms into written contracts, said:

"The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.' Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

Pilcher J. in *Orman* v. *Saville Sportswear, Ltd.*,[2] after a view of the authorities on the subject, said:

"Where the written terms of the contract of service are silent as to what is to happen in sickness, the employer remains liable to continue paying so long as the contract is not determined by proper notice, except where a condition to the contrary can properly be inferred from all the facts and the evidence in the case. If the employer seeks to establish an implied condition that no wages are payable, it is for him to make it out, and the court, in construing the written contract, will not accept any implied term which will not pass the test laid down by Scrutton, L.J. in *Reigate* v. *Union Manufacturing Co. (Ramsbottom),* to which I have referred earlier in this judgment."

Chitty on Contracts, 23rd Ed. Vol. II paragraph 728 sums up the position thus: —

"The right of the employee to claim his salary or wages during his absence from work on account of his illness or injury depends on the terms of his contract. If no express term deals with the matter, the court must attempt to infer an implied term from all the relevant circumstances. The following considerations are relevant in determining such an implied term:

(1) When it is known to the parties that, in practice, the particular employer does not pay wages during illness to employees engaged in a capacity similar to that of the one in question, it is an implied term of the contract that no wages are payable during the employee's illness. On the other hand, if it is known to both parties that wages are usually paid during illness, as in the case of a clerk, it will be an implied term of the contract that the employee shall be entitled to his wages throughout the period of his employment despite any absences due to illness.

... ... "

In the local case of *Appuhamy* v. *Dato' Ajit Singh*[3] the appellant had been employed by the respondent as a master cutter in his firm's tailoring department for over 40 years. The appellant fell ill in 1965 and was in hospital from June to November. He retired from the respondent's service by mutual consent on 23rd February 1966. The respondent had entered into a collective agreement with the trade union of his employees, which provided for payment of salary during illness, medical expenses and retiring benefits. The appellant was not a member of the trade union. He had not been given any notice of terminating his service and he had not been paid any salary since July 1965. It was held by this court that in all the circumstances of the case there was no term expressed or implied that no salary was payable during incapacity and that therefore the respondent was liable to pay the appellant his salary during his absence from work through illness as the contract had not been determined by proper notice.

In the present case the appellant was a part-time clerk with the respondents before his appointment as Executive Secretary under the agreement in question. The respondents were then aware of the appellant's ill-health. On 16th September 1967 the appellant sent in a letter of resignation which was considered by the Executive Committee of the respondents on 27th September 1967, after which the General Secretary by his letter dated 4th October 1967 wrote to the appellant as follows: —

"After due consideration, the said executive members unanimously, rejects your resignation. They have taken notes of your health and have instructed me to extend their sympathies. Nevertheless, in view of the pressure of work in the union and the amount of work for the preparation of the forthcoming election for the 2 years-term office-bearers, the executive members have directed me to request you to continue your service with our union. They have given me full authority to approve your leave whenever you require them for rest or whenever you fall sick."

The appellant again sent letters of resignation on 18th December 1967 and 29th January 1969 to which the General Secretary replied by his letter of 6th February 1968 asking him to continue working and in view of his ill-health giving him three months medical leave on full pay on condition that he remained on call to deal with important work. The appellant tendered his resignation again on 1st July 1968. The respondents again refused to let him go and gave him medical leave on full pay on the same conditions as before.

The appellant was admittedly on sick leave when he tendered his final resignation. It is true that during the period of his resignation he sent only one medical certificate but he produced several medical certificates at the trial of the action covering the whole period. The respondents were fully aware of the appellant's prolonged illness. Under those circumstances they could not possibly have doubted the genuineness of the plaintiff's ill-health during the period of resignation for which he had obtained medical leave from a doctor who was known to them. And they chose not to terminate the appellant's appointment by proper notice.

In the face of all that evidence we found it quite impossible to agree with the learned judge that sick leave with full pay was conditional on prior approval of the union or that it was an implied term of the contract that no salary was payable to the appellant during his absence from work on account of illness. We therefore allowed the appeal with costs here and in the court below, setting aside the order of the learned appellate judge and restoring the judgment of the learned Senior President.

Appeal allowed.

Solicitors: *Skrine & Co.; Aljeffri & Co.*

OOI AH PHUA v. OFFICER-IN-CHARGE, CRIMINAL INVESTIGATIONS, KEDAH/PERLIS

[O.C.J. (Hashim Yeop A. Sani J.) January 13, 1975]
[Alor Star — Originating Motion No. 1 of 1975]

Administrative Law — Habeas Corpus — Arrest by police — Refusal to allow solicitor to see person arrested — Right of subject to consult and be defended by counsel of his choice — Whether denial renders detention unlawful — Federal Constitution, art. 5(3).

In this case the subject had been arrested by the police on December 26, 1974 and after being produced before the Magistrate on December 28, 1974 he was formally charged on January 7, 1975 for abetment in gang robbery. The applicant, the father of the subject, instructed his solicitors and counsel attempted to see the subject but was unsuccessful. Subsequently the applicant applied for a writ of *habeas corpus* and it was alleged that (1) the right of subject to consult and be defended by counsel of his choice commenced immediately after his arrest; (2) this right is an unqualified right and the denial of his right by the police has rendered the detention unlawful.

Held: (1) although under Article 5(3) of the Federal Constitution the person arrested has the right to be informed "as soon as may be" of the grounds of his arrest, the clause does not direct the time when the right of the person arrested to consult and be defended by counsel of his choice begins;

(2) the right of the person to consult and be defended by counsel of his choice should be reconciled with the duty of the police to investigate into the offence and such right should not be exercised to the detriment of such investigation;

(3) in this case the failure of counsel to meet the subject on January 2, 1975 had been satisfactorily explained in the affidavit of the respondent and therefore the application for issue of a writ of *habeas corpus* should be refused.

Cases referred to:-

(1) *Moti Bai* v. *State* A.I.R. 1954 Rajasthan 241.
(2) *Lee Mau Seng* v. *Minister of Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137.
(3) *Ramli bin Salleh* v. *Inspector Yahaya bin Hashim* [1973] 1 M.L.J. 54.
(4) *Re Madhu Limaye* A.I.R. 1969 S.C. 1014.

ORIGINATING MOTION.

Karpal Singh for the applicant.

Datuk Tunku Mukhtar (Legal Adviser, Kedah/Perlis) for the respondent.

Hashim Yeop A. Sani J.: Subject was arrested by the Police on 26th December, 1974. Due to intervening public holidays subject was brought before the magistrate on 28th December, 1974 under section 117 of the Criminal Procedure Code. On 7th January, 1975 subject was charged in the Magistrate's Court, Alor Star for abetment in an armed robbery alleged to have been committed on 26th December, 1974 *i.e.* the date of the arrest aforesaid. The offence in respect of which subject is charged is punishable under the Firearms (Increased Penalties) Act, 1971 and non-bailable. Subject is now in remand at the Alor Star prison.

Applicant is the father of subject. In his affidavit dated 5th January, 1975 applicant states that he tried to see his son after the arrest but was prevented from doing so by the Police. On 30th December, 1974 he instructed his solicitors and on the same day the solicitors wrote to the respondent to ask if counsel could see subject at 12.30 p.m. the same day (Exhibit AP1 in affidavit). The respondent replied that the time and date was not suitable and stated that any other date or time may be arranged with the OCPD Alor Star (Exhibit AP2 in affidavit). The affidavit further states that on the same day that he sent the letter (AP1) counsel saw the respondent and the 2nd of January, 1975 was fixed as a suitable date for the appointment for counsel to see subject. 2nd of January, 1975 was a Thursday and therefore a half day for government departments in Kedah. Counsel went to the police station at various times in the morning of that day together with applicant and others but neither subject nor the respondent was there. Being a half day counsel returned to his office at 1.30 p.m. He wrote a letter to the respondent (Exhibit AP3) alleging breach of Article 5(3) of the Constitution.

On behalf of the respondent the Deputy Officer in Charge, Criminal Investigations, Kedah/Perlis swore an affidavit dated 8th January, 1975 which states that the applicant made his first attempt to see subject only on 30th December, 1974 (which is denied by the applicant). On 2nd January, 1975 subject was accompanying the police to certain places in Kedah in connection with other police reports and did not return to the police station until 3 p.m. that day. The significant parts of the affidavit are at paragraphs 6 and 10 which state as follows: —

"6. The applicant's solicitor was told by the police on 30.12.74 to the effect that investigation was still in progress but it might be possible for him to see Ooi Chooi Toh on the 2nd of January, 1975."

"10. The police only refused a visit by the applicant's solicitor while Ooi Chooi Toh was under interrogation. After investigation was completed Ooi Chooi Toh was allowed to consult the solicitor."

The proposition submitted by counsel for applicant is simply this: (1) the right of subject to consult and be defended by counsel of his choice commenced immediately after his arrest; (2) this right is an unqualified right and the denial by the police of this right has rendered the detention unlawful. Subject is therefore entitled to release.

Counsel for applicant urged the court to compare this right with the equivalent right under the United States Constitution. In my view it is futile to compare any of the rights protected in Part II of our Constitution to their equivalents under the Constitution of the United States for the simple reason that almost all rights under the Constitution of the United States are in absolute terms whereas under our Constitution